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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LI LI, Plaintiff, v. MICHAEL CHERTOFF, Secretary, Department of Homeland Security; EMILIO T. GONZALEZ, Director, United States Citizenship and Immigration Services; ROBERT S. MUELLER, III, Director, Federal Bureau of Investigation; and CHRISTINA POULOS, Director, California Service Center, United States Citizenship and Immigration Services, Defendants.	Case No. 07cv2200 J (JMA) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR ALTERNATIVELY TO REMAND TO UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES DATE: May 12, 2008 TIME: 8:30 a.m. CTRM: 12 Honorable Napoleon A. Jones (No Oral Argument Required)

I. INTRODUCTION

Plaintiff requests that the Court compel Defendants to complete the processing of her naturalization application, however, she has failed to establish the Court's subject matter jurisdiction and to state a claim upon which relief can be granted. The Complaint is therefore subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Plaintiff has not been interviewed by Defendant U.S. Citizenship and Immigration Services (USCIS) regarding her application for naturalization, and by statute, cannot be interviewed until USCIS receives the results of her name check pending with Defendant Federal Bureau of Investigation (FBI). Defendants request that the Court dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim. Alternatively, if the Court finds jurisdiction, Defendants that the Court remand the matter to USCIS for adjudication of the application once the necessary background investigation and subsequent interview are completed.

II. FACTUAL BACKGROUND

Plaintiff, a native and citizen of China, was granted Lawful Permanent Resident status on July 23, 2001. See Declaration of Richard E. Nicholson, (Exh. A), ¶ 16.[1/] On April 28, 2006, Plaintiff filed an Application for Naturalization (N-400) with USCIS' California Service Center. Id. On or about May 15, 2006, the FBI received a name check request from USCIS. See Declaration of Michael Cannon (Exh. B) ¶ 41. To date, as Plaintiff's FBI name check is incomplete and ongoing, her N-400 remains pending. Id. at ¶ 16; Exh. B, ¶ 41.

III. ARGUMENT

A. LEGAL BACKGROUND

By statute, the Secretary of Homeland Security[2/] is authorized to prescribe the scope and nature of the examination of naturalization applicants as to their admissibility to citizenship. 8 U.S.C.

[1/]When considering a motion to dismiss pursuant to Rule 12(b)(1), the district court may review evidence outside the pleadings to resolve factual disputes concerning the existence of jurisdiction without converting the motion to one for summary judgment. See, e.g., Land v. Dollar, 330 U.S. 731, 735 n.4, (1947) ("when a question of the District Court's jurisdiction is raised...the court may inquire by affidavits or otherwise, into the facts as they exist."); Biotechs Research Corp. v. Heckler, 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of material outside the pleadings did not convert a Rule 12(b)(1) motion into one for summary judgment).

[2/]On March 1, 2003, DHS and its USCIS assumed responsibility for the process of naturalization. 6 U.S.C. § 271(b). Accordingly, the discretion formerly vested in the Attorney General is now vested in the Secretary of Homeland Security. 6 U.S.C. § 551(d).

§ 1443(a). Judicial review is limited to those applications that have been denied or not decided within 120 days of examination. See 8 U.S.C. § 1447(a)-(b). Plaintiff's application has not been denied, nor has she been examined by USCIS. See Exh. A, ¶ 17. Thus, the Court does not have jurisdiction under 8 U.S.C. §§ 1421(c), 1447(a), or 1447(b).

In a situation where there has been no examination, the governing statutes and regulations do not provide a time frame for adjudication of a naturalization application. See 8 U.S.C. §§ 1443, 1446, 1447; 6 U.S.C. § 551(d); 8 C.F.R. § 335. Title 8 also fails to provide a mechanism for judicial review of an application when 120 days have not elapsed since the USCIS examination or the application has not been denied. See 8 U.S.C. §§ 1421(c); 1447. USCIS is required to examine each applicant for naturalization. See 8 U.S.C. § 1446(b). The examination takes place in the form of an interview with a USCIS officer and includes a test of English literacy, basic knowledge of the history and government of the United States, and questioning on the answers provided in the application itself. See 8 C.F.R. § 335.2(c). Pursuant to the regulations enacted in the discretion of the Secretary of Homeland Security, the examination may only occur after the completion of extensive criminal background checks, and a "definitive response from the Federal Bureau of Investigation that a full criminal background check of an applicant has been completed." 8 C.F.R. § 335.2(b); Exh. A, ¶ 17. Plaintiff's FBI name check is currently incomplete and ongoing. See Exh. A, ¶ 16; Exh. B, ¶ 41. No examination of Plaintiff has taken place. See FAC, ¶ 8; Exh. A, ¶ 17. As Plaintiff's application has not been denied and she has not been examined, she is not entitled to judicial review. See 8 U.S.C. §§ 1147(a)-(b).

B. THE COURT LACKS SUBJECT MATTER JURISDICTION

Plaintiff asserts the Court has jurisdiction under 28 U.S.C. §§ 1331, 1361,1651, 2201, et seq.; and 5 U.S.C. § 701 et seq. See Complaint, ¶ 1. These statutory provisions do not vest this Court with subject matter jurisdiction. Indeed, other courts in this District have recently found that there is no subject matter jurisdiction over complaints regarding a pending application for naturalization where the FBI name check is pending and USCIS has not conducted an interview. See Dairi v. Chertoff, No. 07cv1014, 2007 WL 3232503, *1 (S.D. Cal. November 1, 2007) ("[T]here appears to be no legal basis for the court to exercise subject matter jurisdiction over the action to compel Defendants to proceed with the naturalization interview."); Song v. Chertoff, No. 07cv0855, 2007 WL 3256201, *1 n.1 (S.D. Cal.

November 1, 2007) (holding that there was no jurisdiction under 8 U.S.C. §§ 1447(b), 1421(c) or "under the provisions cited in his responsive brief"). See also Sehari v. Gonzales, No. 07cv0295, 2007 WL 2221053, *1 (S.D. Cal. July 31, 2007) (granting the defendants' motion to dismiss, in part, as to the USCIS Defendants and but not the Attorney General because the Government did not challenge the claim against him).

1. Federal Question Statute Does Not Vest the Court with Jurisdiction

Plaintiff asserts the Court has jurisdiction under 28 U.S.C. § 1331, the federal question statute. Under this statute, a federal court has subject matter jurisdiction where (1) the claim turns on an interpretation of the laws or Constitution of the Untied States, and (2) the claim is not "patently without merit." Saleh v. Ridge, 367 F. Supp. 2d 508, 511 (S.D.N.Y. 2005). Here, Plaintiff's complaint fails on the second prong. As discussed above, Plaintiff's application for naturalization has not been denied and she has not been examined which leaves her without a mechanism for judicial review. See 8 U.S.C. §§ 1147(a)-(b). Furthermore, Plaintiff may only be examined after her FBI background check has been completed. See 8 C.F.R. § 335.2(b). Accordingly, as Plaintiffs' FBI name check remains pending, her Complaint is without merit and should be dismissed for lack of subject matter jurisdiction.

2. Mandamus Statute and All Writs Act Do not Vest the Court with Jurisdiction

Plaintiff seeks mandamus relief under 28 U.S.C. §§ 1361 and 1651. See Complaint, ¶ 1. Mandamus is an extraordinary remedy. See Cheney v. U.S. Dist. Ct. for Dist. of Columbia, 542 U.S. 367, 392 (2004) (Stevens, J., concurring); Kildare v. Saenz, 325 F.3d 1078, 1084 (9th Cir. 2003). It is intended to provide a remedy for a plaintiff only when she has exhausted all other avenues of relief and only if the defendant owes her a clear nondiscretionary duty. Heckler v. Ringer, 466 U.S. 602, 616 (1984). The Ninth Circuit has articulated that:

> [m]andamus...is available to compel a federal official to perform a duty only if: (1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available.

Kildare, 325 F.3d at 1084 (quoting Patel v. Reno, 134 F.3d 929, 931 (9th Cir. 1997)).

As applied to Plaintiff's situation, her claim is not "clear and certain" and Defendants' actions are discretionary, not ministerial. As discussed above, prior to the examination, the statute and regulations governing applications for naturalization do not provide a time frame for adjudication . See

8 U.S.C. §§ 1443, 1446, 1447; 6 U.S.C. § 551(d); 8 C.F.R. § 335. The statute specifically leaves the adjudication to the discretion of the Attorney General, and now the Secretary of Homeland Security. Id. In fact, USCIS cannot interview a naturalization applicant until it has received a definitive response from the FBI. See 8 C.F.R. § 335.2; Sehari, 2007 WL 2221053, *1; Dairi, 2007 WL 3232503, *1; Song, 2007 WL 3256201, *1. Had Congress intended for such a temporal limitation it would have set a deadline for adjudication based on the date the naturalization application was filed with USCIS as opposed to the date that USCIS examines the applicant. See 8 U.S.C. § 1447(b).

Further, the FBI's investigation involves a discretionary function. See Yan v. Mueller, No. H-07-0313, 2007 WL 1521732, *6 (S.D. Tex. May 24, 2007) (The delay is due to the volume of requests and "the FBI's exercise of discretion in determining the timing for conducting the many name check requests that it received and the manner in which to conduct those checks." (emphasis added)). Such broad discretion is consistent with the well-established proposition that judicial review in immigration matters is narrowly circumscribed and control over immigration is largely entrusted to the political branches of the government. See Matthews v. Diaz, 426 U.S. 67, 81-82 (1976); U.S. v. Valenzuela-Bernal, 458 U.S. 858, 864 (1982); Dairi, 2007 WL 3232503, at *1 ("While Defendants have the nondiscretionary duty to adjudicate Plaintiff's application, the USCIS, the FBI, and other federal agencies have a great deal of discretion in how they process the Congressionally mandated background investigation."). Further, as Plaintiff is in the process of obtaining the relief that she seeks, she has failed to establish that no other adequate remedy exists. Once the FBI name check clears, she will be examined and her application will be adjudicated. See Exh. A, ¶ 9.

Defendants have demonstrated that Plaintiff's naturalization application is in the process of adjudication and therefore Plaintiff's claim is neither clear nor certain nor one subject to nondiscretionary, ministerial duties. See Dairi, 2007 WL 3232503, at *1. See also Li v. Chertoff, 482 F. Supp. 2d 1172, 1179 (S.D. Cal. 2007) (finding that the court did not have jurisdiction over an adjustment of status application under 28 U.S.C. § 1361, the APA, or the Declaratory Judgement Act); Sarvestani v. Chertoff, No. 4:06CV01807-ERW, 2007 WL 1774439, *3 (E.D. Mo. June 18, 2007) (finding that the court did not have jurisdiction over an adjustment of status application under

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28 U.S.C. §§ 1361 and 1651 or under 28 U.S.C. § 1331 and 5 U.S.C. § 706). Thus, 28 U.S.C. §§ 1361 and 1651 do not vest this Court with jurisdiction.

3. Administrative Procedures Act Does Not Vest the Court with Jurisdiction

The Administrative Procedures Act (APA), 5 U.S.C. § 701 et seq., does not provide an independent basis for jurisdiction. Califano v. Sanders, 430 U.S. 99, 107 (1977); Staacke v. U.S. Secretary of Labor, 841 F.2d 278, 282 (9th Cir. 1988). Rather, it merely provides the standards for reviewing agency action once jurisdiction is otherwise established. Staacke, 841 F.2d at 282. Even if the Court found jurisdiction under 28 U.S.C. § 1331, judicial review under the APA is specifically precluded where "agency action is committed to agency discretion by law." Yan, 2007 WL 1521732, at *8; 5 U.S.C. § 701(a)(2) (precluding APA review of agency actions that are "committed to agency discretion by law."). "Agency action," as defined in the APA, includes "a failure to act." 5 U.S.C. § 551(13). That discretion precludes judicial review of both the ultimate decision and the process by which the decision is reached. In Heckler v. Chaney, 470 U.S. 821 (1985), the Supreme Court interpreted 5 U.S.C. § 701(a)(2) to mean that "review is not to be had if the statute is drawn so that the court would have no meaningful standard against which to judge the agency's use of discretion." Id. at 830. As the Court explained, "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" Id.

In addition to the examination process being expressly committed to agency discretion, no statutory or regulatory provisions provide a "meaningful standard" against which to measure the time it takes USCIS to process an application, or the FBI to process a name check. See Chaney, 470 U.S. at 830. Because the statute does not provide a time frame for completion of a name check or examination, there is no standard against which the Court can measure whether either agency has acted "within a reasonable time" or "unreasonably delayed adjudication." 5 U.S.C. § 555(b); 5 U.S.C. § 706(1). The passage of time cannot, standing alone, support a claim of unreasonable delay. INS v. Miranda, 459 U.S. 14, 18 (1982).

Further, a mere processing delay does not necessarily mean the delay is unreasonable. Fraga v. Smith, 607 F. Supp. 517, 521 (D. Ore. Apr. 19, 1985) (class action seeking mandamus for pending citizenship applications). Several courts have recognized that the source of the delay is the most important factor in determining whether the delay is unreasonable. See Wei Tan v. Gonzalez, No. 07cv00133, 2007 WL 1576108, at *3 (D. Colo. May 30, 2007) (holding that determining if a delay is unreasonable depends on the reason for the delay not solely the length of the delay); see also Saleh v. Ridge, 367 F. Supp. 2d 508, 512 (S.D.N.Y. 2005) (finding that the source of the delay is the most important factor to determine whether a delay is unreasonable).

The following security checks must be completed for each naturalization application: 1) an FBI name check; 2) an FBI fingerprint check; and 3) a DHS-managed Interagency Border Inspection System (IBIS) check. See Exh. A, ¶ 8 and attached USCIS Fact Sheet. According to Richard E. Nicholson, Assistant Center Director at the California Service Center (CSC), Plaintiff's FBI name check remains pending. Id. at 16. The CSC audits the status of FBI name checks at least every week. Id. at ¶ 9. Since September 11, 2001, USCIS has submitted millions of name check requests to the FBI, which taxed the FBI's resources and created a backlog. See Exh. B, ¶¶ 23-24. In particular, between December 2002 and January 2003, USCIS submitted almost three million requests. Id. During fiscal year 2007, the CSC received over 400,000 applications for naturalization and it completed processing more than 200,000 such applications. See Exh. A, ¶ 1.

As explained by Michael Cannon, Chief of the National Name Check Program Section for the FBI, the FBI name check process is complex and time consuming. See Exh. B, ¶¶ 13-18. The FBI processes name check requests on a first-in, first-out basis unless USCIS directs that a particular request be expedited. Id. at ¶18. Processing of the name checks depends on many factors, including: where in the processing queue the name check lies; the workload of the analyst processing the name check; the volume of expedited checks that must be processed first; the number of "hits" that must be retrieved, reviewed and resolved; the number of records from various Field Offices that must be retrieved, reviewed and resolved; and the staff and resources available. Id. at ¶ 39.

The FBI's delay in processing Plaintiff's name check is not unreasonable. The FBI is working as expeditiously as possible to reduce the immigration name checks that are backlogged. Prior to September 11, 2001, the FBI processed approximately 2.5 million name checks per year. Id. at 21. For fiscal year 2006, the year that Plaintiff's name check was submitted, the FBI processed in excess of 3.4

million name checks. Id. Requiring the FBI to divert resources to complete Plaintiff's name check by an arbitrary deadline or before other applicants would detract from the FBI's efforts to reduce waiting times for all applicants. Moreover, it would be unfair to applicants who have been waiting longer than Plaintiff. Even in cases involving statutory deadlines, which do not apply here, courts have declined to grant such relief. See, e.g., In re Barr Labs., Inc., 930 F.2d 72, 75 (D.C. Cir. 1991); Mashpee Wampanoag Tribal Council, Inc. V. Norton, 336 F.3d 1094, 1101 (D.C. Cir. 2003).

The nature and extent of the interests at stake here weigh heavily in favor of denying Plaintiff's request. Her interest in an expedited decision on her application is minimal and does not implicate human health and welfare. Plaintiff retains all of the rights and privileges of lawful permanent residence. See Exh. A, ¶ 17. Conversely, the FBI has an important national security interest in ensuring a thorough and accurate result for her background check. See Sze v. INS, No. C-97-0569, 1997 WL 446236, at *7-8 (N.D. Cal. Jul. 24, 1997) (identifying factors to be considered when determining whether a delay is unreasonable). USCIS cannot schedule an interview for a naturalization application until there is a definitive response from the FBI. 8 C.F.R. § 335.2(b); Exh. A, ¶ 17. APA relief is not appropriate in cases alleging unreasonable delay in the FBI's name check process and this complaint should be dismissed. Li, 482 F. Supp. 2d at 1179.

4. Declaratory Judgment Act Does not Vest the Court with Jurisdiction

The Declaratory Judgment Act (DJA), 28 U.S.C. § 2201, does not provide an independent basis for jurisdiction; it only expands the range of remedies available in federal courts. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950); Janakes v. U.S. Postal Service, 768 F.2d 1091, 1093 (9th Cir. 1985) (the use of this statute "does not confer jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint brought without the use of 28 U.S.C. § 2201."). Because there is no jurisdiction under the APA, or other provision, the DJA does not vest this court with subject matter jurisdiction over this complaint.

C. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Alternatively, if the Court finds that it has jurisdiction, Plaintiff still fails to state a claim upon which relief may be granted. Plaintiff's application may not be decided because her background investigation is not yet complete. Had it wished to do so, Congress could have enacted deadlines for the performance of the FBI's background investigation and subjected this process to judicial review. In the absence of such a directive, USCIS has no clear, mandatory duty to adjudicate Plaintiff's application at any particular time, or, in effect, to give preferential treatment to her application by processing it out of the order in which it was received.

Further, Plaintiff has failed to establish that the FBI can be compelled to complete her background investigation. There is no statutory or regulatory requirement that the FBI complete the background check of an applicant within a certain time limit. See Norton v. So. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004); see, e.g., Wei Tan, 2007 WL 1576108, at *4 ("[T]he Court has been presented with no authority which would allow it to require the FBI to conduct a security background check more expeditiously, absent showing of complete inaction by the FBI"); Wang v. Gonzales, No. 07cv0165, 2007 WL 1299871, at *3 (S.D. Cal. Apr. 30, 2007) ("Only the FBI and USCIS are in a position to know what resources are available to conduct the background checks and whether an expedited background check is feasible or efficient in any particular case."); Li, 482 F.Supp.2d at 1179 ("Plaintiff has not pointed to any statute or regulation requiring the FBI to complete her name check in any period of time, reasonable or not."); Shalabi v. Gonzales, No. 4:06cv866, 2006 WL 3032413, at *5 (E.D. Mo. Oct. 23, 2006) ("There is no statute or regulation which imposes a deadline for the FBI to complete a criminal background check"); Zahani v. Neufield, No. 6:05cv1857 ORL 18L, 2006 WL 2246211, at *3 (M.D. Fla. June 26, 2006) (holding that, because alleged delay resulted from the need for FBI background checks, "even if this Court could intervene, it would not."); Nguyen v. Gonzales, No. H-07-0048, 2007 WL 713043, *4 (S.D. Tex. Mar. 6, 2007) ("The enormous number of name checks submitted to the FBI also counsels against judicial intervention in a case such as this one.").

Granting Plaintiff's request to compel the processing of routine immigrant applications out of order would have several negative repercussions. It would unfairly favor applicants with the means to hire an attorney and/or file federal mandamus actions. Applicants without such means would suffer further delays, as other later-filed applications were given court-mandated preferential treatment. The use of mandamus would shorten delay for some, only to lengthen it for others.

Lastly, Plaintiff has failed to establish that she has suffered any cognizable injury. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). While her application is pending, Plaintiff retains all of the rights and benefits of a lawful permanent resident, including the right to work and travel freely. See Exh. A, ¶ 17. Because she has no clear right to immediate adjudication and Defendants' duty is purely discretionary, the extraordinary relief provided by mandamus is not warranted here. Accordingly, the Court should dismiss the Complaint for failure to state a claim upon which relief may be granted.

D. IF JURISDICTION EXISTS, THIS MATTER SHOULD BE REMANDED TO USCIS

The Secretary of Homeland Security has "sole authority to naturalize persons as citizens of the United States." 8 U.S.C. § 1421(a); 6 U.S.C. § 271(b). USCIS is the federal agency charged with processing applications for naturalization. See 8 U.S.C. § 1421 et seq. USCIS is required to conduct a personal investigation and examination of each applicant for naturalization. See 8 U.S.C. §§ 1446(a)-(b); 8 C.F.R. §§ 335.1-335.2. In situations in which there has been an interview by USCIS after which more than 120 days elapse without a decision whereby district court jurisdiction is not in dispute, Congress provided the Court with two options. See 8 U.S.C. § 1447(b). The Court retains exclusive jurisdiction over the application and may either determine it or remand it to USCIS with appropriate instructions. Id.; see also United States v. Hovsepian, 359 F.3d 1144, 1160.

Within the 8 U.S.C. § 1447(b) context, when there is a basis for jurisdiction, courts in this District have overwhelmingly elected to remand applications for naturalization to USCIS with instructions to adjudicate the application as expeditiously as possible after the FBI's completion of the name check. See Somo v. Gonzales, No 07cv0637, 2007 WL 2700948, *3 (S.D. Cal. Sept. 10, 2007); Penalosa v. U.S. Citizenship & Immigration Servs., No. 07cv0808, 2007 WL 2462118, *3 (S.D. Cal. Aug. 28, 2007); Ma v. Chertoff, No. 07cv0033, 2007 WL 2462103, *3 (S.D. Cal. Aug. 27, 2007); Yang v. Chertoff, No. 07cv0240, 2007 WL 1830908, *4 (S.D. Cal. June 25, 2007); Ghazal v. Gonzales, No. 06cv2732, 2007 WL 1971944, *4 (S.D. Cal. June 14, 2007); Wang v. Gonzales, No. 07cv0165, 2007 WL 1299871, *3 (S.D. Cal. Apr. 30, 2007). There are several advantages to remanding this matter to USCIS. The application will be adjudicated by the federal agency most equipped to evaluate the application. It will accomplish the congressional intent of uniform examination. See 8 U.S.C. § 1443(a) (the examination "shall be uniform throughout the United States"). Further, it will leave Plaintiff with an avenue for judicial review under 8 U.S.C. § 1421 (c) if the application is ultimately denied by USCIS.

The instant Complaint is not a § 1447(b) matter, however, if this Court finds that jurisdiction exists, it is appropriate to remand the matter to USCIS. USCIS is prepared to complete adjudication of Plaintiff's application once it receives a response from the FBI. See Exh. A, ¶ 9. Therefore, if the Court finds it has jurisdiction, Defendants request that the matter be remanded to USCIS for adjudication once the FBI name check is complete.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully ask the Court to dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim. In the alternative, Defendants request that the Court remand the matter to USCIS for adjudication once the FBI name check is complete.

DATED: February 8, 2008

Respectfully submitted,

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